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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Annual Assessment of the Status of)
Competition in Markets for the)
Delivery of Video Programming)

CC Docket No. 99-230

COMMENTS OF RCN CORPORATION

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SUMMARY

RCN Corporation, which is developing a significant competitive role in the MVPD marketplace, is happy to submit these Initial Comments in the Commission's annual assessment of the state of competition in the MVPD industry. RCN, an entity which owes its very existence to the opportunities created by the procompetitive provisions of the Telecommunications Act of 1996, is committed to a unique business plan. RCN plans to provide four related telecommunications services: local exchange and long distance telephony, high speed Internet access, and broadband video distribution. It will do so by bundling these services and providing them over one of the most modern fiber optic networks being built anywhere or by any telecommunications entity. RCN plans to concentrate primarily on densely populated and demographically desirable areas of the country, including the Boston to Washington corridor in the east and the San Francisco to San Diego corridor in the west. Alone among major new entrants, RCN has elected to concentrate its construction and marketing on the residential market, which is historically not as profitable as the business community for telecommunications carriers. RCN currently provides MVPD service in the Boston, New York, and Washington D.C. metropolitan markets, in Pennsylvania and New Jersey, and is actively planning for or constructing facilities in northern New Jersey, and in the Philadelphia, San Francisco, Los Angeles and Phoenix, AZ metropolitan areas.

RCN's preferred mode of entry into the MVPD market is as an open video system ("OVS") operator because this approach, as designed by Congress and implemented by the Commission, essentially limits local authorities' jurisdiction over the new entrant to management of public rights-of-way. RCN currently provides OVS service in the New York City and Washington, D.C. areas, and until last month in Boston, where it is now a cable franchisee. It has signed or is negotiating numerous OVS agreements in suburban communities around these cities as well as in New Jersey and the Philadelphia metropolitan area. These initiatives make RCN the

largest OVS operator in the country, and indeed the only one of any significant scale. At the same time, RCN also operates numerous franchised cable systems in these areas. Whether to function in any given area as an OVS or as a franchised cable operator is primarily a question of the preferences of the local governments.

RCN is building a state-of-the-art fiber optic network, capable of carrying up to 860 MHz and optimized for all of its services. Twelve fiber strands are being installed, even though only two are currently needed. RCN has spent hundreds of millions of dollars to establish its business and to construct the first segments of its network. Substantially more investment will be made in the coming 12 months. At year end 1998, RCN had approximately 81,000 video connections on-net and an additional 175,000 video connections being provided on an interim basis by leased facilities.

RCN is making good progress in developing the markets it wishes to serve. Its MVPD subscribership is growing constantly. It bears emphasis, however, that the enormous capital cost associated with the purchase and installation of fiber optic plant, together with the administrative costs associated with the start-up and operation of a geographically diverse business, would not have permitted RCN to develop its business based solely on the distribution of video programming. It is only the important economies which can be achieved by integrating its four distinct service offerings which make RCN's business plan practical. In evaluating RCN's progress and status in the MVPD segment of its business, this factor must be kept in mind.

The Notice of Inquiry inquires about barriers to the introduction of MVPD competition. RCN welcomes this opportunity to make the Commission aware of the difficulties with which RCN must contend, even though most of these issues already have been brought to the Commission's attention through various filings at the Cable Services Bureau. The following

matters constitute significant barriers to entry or significant impediments to the successful development of a competitive MVPD business:

- Incumbents' efforts to chill or undermine MVPD competitive entry;
- Erroneous and ill-advised rulings by the Cable Services Bureau;
- Inability to gain access to MDU inside wiring;
- Denial of access to essential programming;
- Difficulty in accessing local rights-of-way on fair and reasonable terms; and
- Adverse judicial action

In the markets in which RCN is operating as a new entrant, incumbents have responded to competitive pressures by improving their services, lowering or foregoing rate increases, offering bulk discounts to MDUs, or otherwise providing better service or lower-cost service to their subscribers. RCN has no quarrel with such competitive responses. Unfortunately, the incumbents have also responded in certain anti-competitive ways, one of which is to use the Commission's OVS rules to seek to pry from RCN competitively sensitive data on its OVS system. This has occurred on four occasions. Although the relevant rule plainly bars access to such data by a competitive in-region cable operator, the Cable Bureau has three times ruled in favor of the incumbent cable companies, finding that RCN, for example, is obligated to turn over to Time Warner, with which RCN competes in Manhattan, data which would give Time Warner significant competitively sensitive data on RCN's New York City OVS plans and designs. For the Cable Bureau to have adopted an interpretation of the OVS rules which is actually anti-competitive is itself a significant barrier to further OVS entry to the MVPD market. RCN has sought reconsideration of the Bureau's rulings on legal and policy grounds.

Multiple dwelling units ("MDUs") account for approximately 30% of the residential market and the bulk of RCN's subscriber base is in MDUs. While RCN prefers to wire these

buildings with its own state-of-the-art fiber optic wiring, a significant percentage of the MDU owners will not allow RCN to engage in such construction because of the noise or disruption to the residents. In such cases RCN has sought to use the incumbent's existing inside wiring, offering to negotiate reasonable compensation for such use, with no preconceived positions about what reasonable compensation should be. In every such case RCN has been rebuffed by the incumbent, who insists that it owns the wiring and has a contractual or statutory right to complete dominion over the use of the wiring, including, of course, the exclusion of a competitor. RCN is thus not able to provide its service to many hundreds of MDU residents.

RCN sought a narrow ruling from the Cable Bureau last September which would have had the effect of compelling incumbents to share existing wiring with RCN if the MDU owner refused RCN's request to install its own wiring. As of this date, however, RCN has had no response from the Bureau. In a dynamic, evolving competitive environment in which regulation is an important element, inaction on the part of the Cable Bureau over a period of almost an entire year is distressing. More than that, it constitutes a significant barrier to competitive entry not to have a ruling-- any ruling, even a negative one-- from the regulator vested with an important question. RCN urges the Commission to resolve the pending request for relief in its favor, and to do so rapidly. More broadly, access to inside wiring in MDUs is so critical to the gamut of emerging MVPD competitors that the Commission must do more to compel reasonable access to incumbents' wiring. Such access should include fair compensation to such incumbents if they can prove they own the wiring.

Without adequate programming, no investment and no technology provides public benefits. RCN has encountered two instances in which Cablevision, with which it competes in both Boston and New York, has sought to withhold important programming from RCN. In one case, after RCN filed a complaint under the Commission's program access rules, the matter was

favorably resolved. In another pending matter, RCN seeks a ruling from the Cable Bureau that Cablevision is required by section 628 of the Communications Act and the program access rules to make certain sports programming available to RCN in New York City, even though the programming is, in part, transmitted by terrestrial means. The programming in question was until recently distributed by satellite and carried by RCN. Its carriage is crucial to the establishment of a commercially viable competitive profile in the very demanding New York City MVPD market, especially because RCN, with its relatively small subscriber base, is attempting to compete with the entrenched cable operators who, combined, have 4 million regional subscribers, or 8 times the number served by RCN. Cablevision, of course, carries the disputed programming on its New York City cable system. Like Comcast in Philadelphia, which successfully contended in two separate program access complaints brought by DBS operators that terrestrially delivered programming is outside the ambit of section 628 of the Act, Cablevision in New York argues that it has no program access obligations to a local competitor because the programming in issue is now being transmitted terrestrially rather than by satellite.

RCN has challenged this position in its recent complaint, arguing that section 628 is not limited to cable programming which is transmitted by satellite and that the Commission has ample authority under the Act to compel Cablevision to make critical sports programming available to its local competitor, especially where the programming has been moved from satellite to terrestrial distribution to evade a program access obligation. The matter is currently before the Bureau. RCN's inability to access the programming in dispute puts at risk both its enormous investment in wiring Manhattan and its plans to expand its service into the other boroughs of the city. More broadly, the Commission must act to inhibit the cable industry's plan to massively migrate programming to terrestrial distribution in the hope of evading its program access obligations.

As RCN noted in its MVPD Comments in last year's inquiry, securing commercially reasonable agreements for the use of public rights-of-way has proven to be a very substantial problem for RCN. The visibility given new investment in, and the growing importance of, the telecommunications industry has apparently created an expectation in local franchising authorities that entities such as RCN (and many others equally) may be asked to bear unreasonable or unfair financial or service burdens to reach agreement for the use of local public rights-of-way. This problem is growing ever more acute and RCN urges the Commission to expand its recently initiated inquiry in Docket No. 99-217 on rights-of-way issues for telecommunications services to encompass MVPD providers as well. In such a proceeding the Commission should set forth clearly and succinctly the limitations which various provisions of the Communications Act impose on local public rights-of-way managers. Doing so will accelerate competitive entry both in MVPD and in CLEC and Internet services. If local authorities do not accept the primacy of the federal role under the Communications Act, and the correlatively limited local role, the Commission can then consider whether further legislation is necessary or appropriate enforcement action is warranted.

Finally, RCN emphasizes the substantial anticompetitive impact on OVS operators of the recent ruling of the 5th Circuit Court of Appeals, *City of Dallas, v. FCC*,¹ in which the Court invalidated the Commission's rule preempting the right of local authorities to franchise OVS operations. By doing so the decision largely undercuts the regulatory design of, and economic viability of, OVS as a alternative mode of providing MVPD services and creates delay, uncertainty, and added expense for OVS operators. Congress gave OVS operators relief from local franchising obligations to balance the onerous obligation on such operators to make

¹ 165 F.3d 341 (1999), *recon. den.* May 28, 1999.

available up to two-thirds of their system capacity to outside programmers. If that relief is not available the commercial viability of OVS is seriously threatened. RCN urges the Commission to seek a writ of *Certiorari* from the Supreme Court to review the *City of Dallas* decision and upon such review, to reverse the appellate court's holding that the FCC lacks power under the Telecommunications Act of 1996 to preempt local franchising of OVS systems.

In sum, RCN is making significant progress in providing high quality alternative MVPD services in numerous urban and suburban markets. It is doing so in spite of certain significant barriers, and if those barriers were removed could undoubtedly increase its rate of growth and the degree of its penetration. It is undeniable that the Commission itself is contributing to the difficulties faced by RCN, both through the anticompetitive rulings of the Bureau, and by failing to boldly use its existing statutory authority to advance the cause of competition.

If the Commission believes that it lacks sufficient authority to remedy inside wiring and program access issues (or any other issue addressed herein), it should so advise the Congress and make a concerted effort to secure the additional legislative authority which it believes it needs.

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INITIAL COMMENTS OF RCN CORPORATION

RCN Corporation ("RCN"), one of the nation's newest and most innovative participants in the multichannel video programming distribution ("MVPD") industry, hereby submits its Comments in response to the Commission's Notice of Inquiry ("Notice") in the above-captioned proceeding. Pursuant to Section 628(g) of the Communications Act,^{2/} the Notice seeks information and views from participants in the MVPD industry concerning the state of competition in the delivery of such services. RCN is pleased to offer its perspective on this issue of continuing importance to the nation. While RCN is making excellent progress both as an open video system ("OVS") operator and as a traditional Title VI franchised cable operator in building its state-of-the-art broadband fiber plant, and is constantly adding to its subscriber base, the MVPD industry remains overwhelmingly dominated by franchised incumbent cable operators. These incumbents continuously demonstrate their commitment to burdening RCN's entry into the market in every conceivable way, including locking RCN out of numerous multiple dwelling unit buildings ("MDUs"), denying RCN access to vital programming, and filing numerous meritless complaints at the Commission seeking competitively sensitive data regarding RCN's OVS

^{2/} 47 U.S.C. § 548(g).

systems or in the alternative, urging the Commission to revoke RCN's OVS certifications. To assure the continued expansion of competition in the MVPD market, the Commission must become more actively involved by taking pro-competitive regulatory steps to foster competition and protect nascent entrants from the overwhelming and costly burdens wrought by the incumbents.

I. INTRODUCTION

RCN, together with its subsidiaries and affiliates, is unique among new competitors in the telecommunications marketplace in a number of respects. RCN is building out its own network based on state-of-the-art fiber optic facilities, a network which has been described by one outside source as "one of the most advanced in the world."^{3/} RCN's optical fiber typically runs physically closer to homes than do the cable companies' distribution facilities. It has fewer subscribers per node, so that more bandwidth is available for every customer. RCN runs a minimum of 12 fiber strands to each node, of which two are required for current use. The additional ten are in place for added services to keep pace with future demand.^{4/} Unlike most competitive entrants, RCN seeks to serve principally the residential, rather than the commercial market. RCN's business strategy

^{3/} Morgan Stanley Dean Witter Report, March 31, 1999. RCN has been rated # 2 out of 100 of the most innovative telecommunications companies in America. *See* Forbes ASAP Dynamic 100 List, April 5, 1999.

^{4/} RCN's fiber optic distribution plant is vastly superior in quality and in bandwidth to that of most current cable systems. Its network provides 860 MHz of bandwidth, passing 150 homes per node. In most cases its fiber is 900 feet or less from homes. Cable systems generally provide service over coaxial cable with a bandwidth of 550 MHz or less, and serve 500-5000 homes per node. RCN's network is also superior to traditional coaxial cable networks because it contains switching architecture for telephony, contains fewer electronic components, and is more easily maintained, scaled to local demand, and more reliable.

also encompasses the bundled provision of four categories of service, rather than just one or two: RCN seeks to provide video distribution services, high-speed Internet access, local exchange telephone and long distance telephone services to its subscribers. The third unique element in RCN's planning is that it has limited its entry to relatively densely populated regions in the Boston to Washington, D.C. corridor on the east coast, the San Francisco to San Diego corridor on the west coast, and recently to Phoenix, AZ. These regions comprise only 6% of the land area of the U.S. but contain slightly more than 24% of the households and are more economical for a new entrant to develop because of their greater density.

RCN thus provides its four services on a bundled basis in Massachusetts, New York, New Jersey, Pennsylvania, Maryland and in the District of Columbia. Broadband fiber optic facilities are under active construction in those states, in Virginia and in California. In its MVPD mode, RCN has chosen to operate wherever possible as an open video system ("OVS") operator, and has been so certified by the FCC for operation in the metropolitan areas of Boston, New York, Philadelphia, Washington, D.C., San Francisco, CA, Los Angeles, CA and Phoenix, AZ. RCN has been operating OVS facilities in Boston and a number of Boston's suburban communities, in New York City and in Washington, D.C.^{5/} It is negotiating OVS agreements with local franchising authorities in numerous suburban communities clustered around these major urban areas and in the Philadelphia urban area. RCN has also entered into traditional Title VI franchise agreements in many communities. In each case, while RCN prefers to initiate service in the OVS mode because that is generally the quickest way to enter a local market, it generally seeks to

^{5/} Last month RCN signed a franchise agreement with the City of Boston and accordingly is no longer offering service as an OVS operator. See Appendix B hereto.

accommodate the preferences of local franchising authorities, many of which prefer the traditional franchise approach because they are familiar with it.

RCN also provides local exchange and long distance telephone service. It is the seventh largest Internet service provider ("ISP") in the country, and the largest regional ISP in the Northeast corridor. Including all of its service connections, those provided on its own fiber network and those leased from incumbent local exchange carriers ("ILECs"), RCN had a total of more than 850,000 service connections as of December 31, 1998, of which more than 260,000 represent video service connections. In 1998, RCN's consolidated revenue increased 92% to \$245.1 million, compared with \$127.3 million in 1997. In the fourth quarter of 1998 alone, advanced fiber-optic net connections grew 48.9%, and on-net voice, data and video connections grew 48%, 69% and nearly 50%, respectively. The company is constantly expanding its MVPD service area and expects to initiate video services in the Philadelphia and San Francisco metropolitan areas in late 1999 or early 2000 and in the Los Angeles and Phoenix areas shortly thereafter.⁶ⁱ

II. RCN IS BUILDING A COMPETITIVE PRESENCE IN NUMEROUS MVPD MARKETS

Although RCN is a new entrant in the MVPD marketplace, it is by now well known to the Commission. RCN, together with its affiliates, currently has OVS certifications from the FCC which encompass more than 8 million homes. Prior video competition reports to Congress have

⁶ⁱ Appendix A hereto is a tabular presentation of RCN's service connections as of December 31, 1998.

described RCN's activities through the period ending June 30, 1998.^{7/} Accordingly, these comments will concentrate on recent developments in RCN's competitive activities in the MVPD markets.

A. Boston Metropolitan Area

RCN's total MVPD subscribership in the Boston metropolitan area is approximately 11,000 as of June 30, 1999. The bulk of these connections, some 5,000, are in the City of Boston in which RCN operated initially as an OVS operator but has now signed a franchise agreement with the City.^{8/} Its operations in the Boston area are in the form of a limited liability company, RCN-BecoCom, 49% of which is held by BecoCom, Inc., a subsidiary of the Boston Edison Company. RCN has signed OVS Agreements in five Boston suburbs, and has been awarded cable franchises in eleven other communities. Negotiations for additional OVS and franchised cable systems are underway in another 31 suburban communities. RCN-BecoCom's service in the Boston area consists of video, high-speed Internet access, and local and long-distance telephone services. Subscribers are free to order any combination of services from RCN-BecoCom. Its video fees are in most cases lower than its competitors' and it offers higher channel capacity. There is a 5% reduction in the constituent fees if the customer elects to receive all four services. Competition in the Boston area has led to reductions in price increases by incumbent cable

^{7/} See *Fourth Annual Report, Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 1034 (1998), at ¶¶ 131-132 and *Fifth Annual Report*, 13 FCC Rcd 24284 (1998) at ¶¶ 121 and 136-137.

^{8/} See Appendix B hereto, consisting of numerous articles appearing in Boston-area newspapers concerning RCN and the competition it is bringing to the Boston-area market. While some of the articles are completely accurate in respect to minor details, in the aggregate they provide a striking tableau of the competitive pressures RCN is introducing in the Boston area.

systems, a rate freeze in one community, and promises from incumbents to improve service and customer relations.^{9/} In the Boston metropolitan area, RCN competes with Cablevision, Media One, and Time Warner. Expansion of RCN's fiber-optic plant in the Boston area is dependent partially on its ability to use existing underground facilities in Boston owned by Boston Edison, and partially on the pace at which Bell Atlantic-Massachusetts makes conduit and pole space available. Both forms of construction have proven to be far slower than anticipated because RCN's competitors have sought to slow its penetration into their respective monopoly markets.^{10/}

B. New York City Metropolitan Area

RCN's New York City system consists of fiber-based OVS service and, pending further construction of the fiber plant, use of microwave-based service. There are approximately 50,000 MVPD subscribers in New York City, the bulk of whom are clustered in Manhattan. RCN currently offers service as well to MDUs in the Bronx and Queens, and recently extended its OVS Agreement with the city to include all five boroughs. Accelerated construction in the outer boroughs is in the active planning stage. In Manhattan RCN competes with Time Warner, which also serves Queens and a portion of Brooklyn. In the Bronx RCN competes with Cablevision which serves a portion of Brooklyn as well. The New York City MVPD market is the most

^{9/} These matters were detailed in RCN's July, 1998 initial comments submitted for the Commission's most recent annual report on the state of MVPD competition.

^{10/} In regard to the underground conduit in Boston, Cablevision has instituted a lawsuit in an effort to block further expansion of RCN-BecoCom's use of Boston Edison conduit. A preliminary injunction was recently denied in *Cablevision of Boston v. Public Improvement Commission*, 38 F. Supp. 46 (D. Mass. 1999). An appeal of that denial is pending in the First Circuit Court of Appeals.

important in the country and is fiercely competitive. RCN's rates in New York are lower than those of its competitors and it offers more channels. In Manhattan, for on-net customers, RCN offers over 85 channels for a monthly fee of \$27.95; for off-net customers the monthly fee is \$24.95 for over 60 channels. Customers are being added to the fiber-based network at the rate of approximately 1,100 per month. RCN's New York City service consists of the same four elements available in Boston, with the same 5% reduction available for subscription to all four services.

The Manhattan market is overwhelmingly based on service to MDUs. Time Warner, which has approximately 1.3 million cable subscribers in New York City, has been aggressively offering bulk discounts to MDUs in response to the availability of RCN's competitive services. Construction of RCN's fiber optic network in Manhattan is entirely dependent on the cooperation of Bell Atlantic - New York, and is progressing far more slowly than RCN anticipated. RCN has protested the slow rate of progress and has raised the matter as a competitive concern with the New York State Public Service Commission.^{11/}

C. Washington, D.C. Metropolitan Area

In the Washington, D.C. area RCN provides service through its Starpower affiliate in which an unregulated subsidiary of Potomac Electric Power Company holds a 50% interest. OVS service began in the District in late 1998. Starpower currently serves approximately 3000 subscribers, almost all of whom are in MDUs. Starpower offers a 94 channel system for a monthly fee of \$31.95. Its District competitor, District Cablevision, provides 55 channels at a

^{11/} Letter of RCN filed on March 3, 1999 in Docket No. 97C0271.

cost of \$ 36.95.^{12/} As in Boston and New York, the video service is available with high speed Internet access, and local exchange and long distance telephone services. Starpower has been welcomed as a potential second source of video and telephony in Washington, D.C. and every surrounding jurisdiction in which it has initiated discussions. It has signed an OVS agreement with the City of Gaithersburg, Md. and began service there on July 15th. A franchise agreement was approved by the Montgomery County Council on August 3rd, and Starpower expects to initiate service to portions of the county in the first quarter of 2000. Starpower is close to signing franchise or OVS agreements in various suburban jurisdictions including Prince George's County and Falls Church, VA. Construction and active construction planning is underway in all these and other suburban Washington areas.

D. Other Metropolitan Areas

RCN has been certificated by the Commission to operate an OVS system in Northern New Jersey and in the Philadelphia, San Francisco and Los Angeles and Phoenix, AZ metropolitan areas. Active negotiations and system planning for these areas are underway. In California RCN has been granted a cable franchise in Daly City, and an OVS Agreement in South San Francisco. It also has right-of-way construction agreements in five Bay area cities. The company expects to sign OVS and franchise agreements in a number of northern New Jersey and suburban Philadelphia locations within a few months. The principal incumbent cable operator in the

^{12/} AT&T, which has acquired the Washington, D.C. cable system, has agreed to sell it to Comcast. Media General, which currently operates the largest cable system in the Washington area with some 245,000 subscribers, has agreed to sell its Fairfax County system to Cox Communications. In Montgomery County RCN will be competing with CableTV Montgomery and in Prince George's County with Jones Intercable. Comcast has announced the acquisition of both systems, as well as Jones' Arlington, VA system.

Philadelphia region is Comcast. TCI operates in San Francisco, and twelve incumbents offer franchised cable service in portions of Los Angeles. Further OVS certifications will be sought in the Western portion of the U.S. before year's end 1999. RCN also operates a number of franchised cable systems in Pennsylvania and New Jersey and expects to continue to do so. One of these competes with another local system. Rate increases in this community have unquestionably been constrained by the presence of competitive systems.

E. The Open Video System Model

RCN is the largest investor in, and implementer of, the OVS concept. It has successfully used the OVS model to initiate competitive entry in three major urban areas and expects to do so in others as well, subject to the concerns detailed in section III, below. As the Commission is very well aware, the Congressional intent in creating the OVS option was to stimulate entry into the heavily monopolized MVPD industry by creating a cable provider with carriage obligations to unaffiliated program suppliers.^{13/}

Although the OVS model contemplated by Congress and elaborated by the Commission in its OVS rules was burdened with this potential carriage obligation, certain important regulatory advantages were also provided, including the all-important freedom from local franchising for OVS systems.^{14/} However, RCN has found that as a practical matter it remains necessary to negotiate with each jurisdiction individually because local authorities retain the power to manage

^{13/} See § 653(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 573(b) and *FCC OVS Second Report and Order*, 11 FCC Rcd. 18223 (1996) at ¶37, *reversed and remanded, in part, sub nom. City of Dallas v. FCC*, 165 F.3d. 341, *recon. den.* May 28, 1999. See also 47 C.F.R. §76.1503.

^{14/} 47 U.S.C. §573(c)(1)(C).

their rights-of-way^{15/} and use that power to leverage other obligations from a certificated OVS operator. It has therefore proven necessary in each community where OVS operation is desired by RCN and accepted in principle by the local authorities to negotiate a local OVS Agreement. Although the negotiation of OVS agreements usually requires 3-4 months, RCN has found that such negotiations are concluded far more quickly than is the case in traditional franchise negotiations. Wherever RCN has entered a market as an OVS operator it has made available to unaffiliated potential video program providers ("VPPs") all the information required by the rules to be disclosed to such potential users. Although RCN has received numerous inquiries in this connection, no VPP has as yet elected to seek carriage on RCN's OVS facilities.^{16/}

In many instances the availability of the OVS model, with the potential freedom from the normally rigid, time-consuming, and expensive franchising process, has proven extremely useful in local negotiations even when RCN has ultimately not followed the OVS route. Faced with the prospect of having local control only over rights-of-way issues, numerous local franchise authorities have exhibited a willingness to negotiate franchises with RCN more rapidly or on terms which are less onerous than would otherwise have been the case. However, as noted in section III *infra*, recent developments have cast a large and perhaps a fatal shadow over the OVS approach to competitive entry.

^{15/} Conference Report at 178; *FCC Second Report and Order* at ¶¶ 208-209.

^{16/} In the San Francisco metropolitan area, RCN received no inquiries from potential VPPs.

III. IMPEDIMENTS TO COMPETITIVE ENTRY TO THE MVPD MARKET

The Notice of Inquiry repeatedly emphasizes the Commission's desire that commenters focus on actual competitive conditions and on barriers to entry.^{17/} In the approximately two years RCN has been focused on MVPD entry it has accumulated a regrettable degree of first hand experience in addressing such barriers. These barriers consist of the following:

- A) Incumbents' efforts to chill or undermine OVS entry;
- B) Erroneous and ill-advised rulings of the Cable Services Bureau;
- C) Inability to gain access to MDU inside wiring;
- D) Denial of access to essential programming;
- E) Difficulty in accessing local rights-of-way on fair and reasonable terms; and
- F) Adverse judicial action.

Each is discussed below.

A. Incumbents' Efforts To Chill Or Undermine OVS Entry

Faced with the prospect of significant new competition, the entrenched monopolists have reacted both by improving their services and service offerings, moderating rate increases, or in other ways advantageous to consumers. These competitive responses are detailed in Appendix B, containing a variety of Boston-area press clippings. RCN accepts such legitimate marketplace competition and is confident that it has a superior product and a successful marketing plan. Unfortunately, however, incumbents have also reacted to RCN's market entry by developing a number of anticompetitive strategies. One approach which has proven very popular is to seek

^{17/} See, e.g. Notice at ¶¶ 5 and 6.

sensitive competitive data on the proposed OVS system in the guise of potentially becoming a video program provider ("VPP") on RCN's local system. Under the Commission's OVS rules the OVS operator is obliged to offer nondiscriminatory access to its system for video program providers.^{18/} In RCN's Initial Comments filed in response to last year's Annual Assessment it outlined this approach and the three instances of it then known to RCN.^{19/} Thereafter a fourth such attempt occurred in a formal complaint filed by Media General of Fairfax County, Inc., and Media General of Fredericksburg (collectively "Media General").^{20/} Following the pattern established by the comparably situated cable incumbents in Boston and New York, Media General alleged that, although it was the franchised cable operator in Fairfax County, VA and as such operated well within the Washington, D.C. metropolitan OVS area certified by the Commission to Starpower, it was not a "competing in-region cable operator" within the meaning of § 76.1503(c)(2)(v) of the rules and was accordingly entitled to review Starpower's competitively sensitive system data for all of the proposed Starpower system other than the portion planned for its own franchised area.

^{18/} See 47 C.F.R. § 76.1503(a).

^{19/} See Comments of RCN filed July 31, 1998 at 10-12. In two of these matters, *Time Warner v. RCN BecoCom*, 13 FCC Rcd 8613 (1998), and *Time Warner v. RCN Telecom Services of New York, Inc.*, DA 98-2641, *rel.* Dec. 30, 1998, the Cable Services Bureau directed RCN to provide certain system data to Time Warner. These proceedings are pending before the Cable Services Bureau on RCN's petitions for partial reconsideration. In Time Warner's New York complaint Time Warner is also seeking review by the full Commission of the portion of the Cable Services Bureau decision which rejected certain of Time Warner's requests for RCN's OVS data.

^{20/} See *Media General v. Starpower*, FCC 99-885, *rel.* May 10, 1999, *recon. pending*.

As in the prior disputes with Cablevision and Time Warner in Boston, and in New York with Time Warner, RCN, through its affiliate Starpower, contended that as a franchised cable operator within the OVS service area certificated by the FCC to Starpower, Media General was a "competing in-region cable operator," as such was not entitled under the plain language of the OVS rules to be a video program provider on RCN's system, and was therefore not entitled to the disclosure of RCN's competitively sensitive system and operational data.

Another anticompetitive effort was undertaken late in 1998 by Cablevision of Boston which filed suit in the U.S. District Court for Massachusetts against the Boston Public Improvements Commission, RCN, RCN-BecoCom, BecoCom and Boston Edison. In its suit Cablevision sought to have the Court stay further implementation by RCN-BecoCom of its business plan to use existing conduit and fiber to accelerate the roll-out of RCN-BecoCom's competitive OVS services in the City of Boston. The District Court denied any injunctive relief to Cablevision and found on the record that Cablevision's case was not likely to succeed on the merits.^{21/} Indeed, the Court characterized RCN-BecoCom as "a paradigm of the new entrant that Congress contemplated,"^{22/} and observed that:

Cablevision has brought this suit, which I have preliminarily found has little chance of succeeding, just as the people of Boston have a realistic hope of receiving the benefits of fair competition in the cable television industry. Those benefits include more choices, better service and the prospect of lower prices. It would be contrary to the public interest to issue the preliminary injunction Cablevision now seeks.^{23/}

^{21/} *Cablevision of Boston, Inc. v. Public Improvement Commission, et al*, 38 F. Supp 2d 46, 58-9 (D. Mass 1999).

^{22/} *Id.*, at 54

^{23/} *Id.* at 63.

B. Erroneous and Ill-Advised Rulings of The Cable Services Bureau

To date four incumbent cable companies have attempted to gain access to RCN's local OVS system data by posing as potential VPPs. In one case the Bureau correctly held that Cablevision was not entitled to the data because it operated in the area for which it was seeking such data.^{24/} In three other cases, however, the Cable Services Bureau concluded that in-region cable competitors were entitled to such competitively sensitive data if they merely restricted their request to areas of the region in which they are not franchised operators. Thus, for example, the Bureau held that Time Warner, which competes with RCN for video subscribers in Manhattan, is entitled to sensitive data on the RCN system if it nominally asks for data concerning only a small section of Brooklyn in which Time Warner is not the franchised operator. And the Bureau held to this view even when RCN noted that its system data were largely the same from one area of a metropolitan area to another. In the *Media General* complaint involving Starpower, the Cable Services Bureau similarly held that the local cable competitor was entitled to OVS data except for any data relating to Fairfax County, the region in which Media General operates even though the data sought by Media General is largely generic for the market as a whole. RCN and Starpower have sought partial reconsideration of these decisions which are currently pending before the Cable Services Bureau.

RCN respectfully suggests that these rulings, by exposing RCN and other nascent OVS investors to the kinds of internal document disclosure that would be considered wholly inappropriate in a normal commercial context, significantly handicap the rollout of new OVS

^{24/} *Cablevision of Boston, Inc., et al.*, 13 FCC Rcd 18854 (Cab. Servs. Bur.1998).

systems. It is for this reason that RCN, as the largest implementer of OVS, has indicated in its pleadings and reconsideration petitions that the Bureau's rulings significantly skew the economic appeal of OVS into negative territory and may contribute to rendering nugatory Congressional intent in enacting § 653 of the Communications Act. RCN has emphasized in its pleadings that the rule in question is simple and unequivocal: an in-region cable competitor is not entitled to become a VPP because the opportunity to do so would both minimize the incentive to expand the cable operator's own system, and would also create an opportunity for the cable operator to impair the availability of the OVS system for legitimate VPPs. But even if it is assumed, contrary to fact, that the rule is not plainly distorted and significantly rewritten by the interpretation put on it by the Bureau's decisions, RCN contended that any ambiguity should be construed in a way which protects OVS operators from inappropriate disclosure of sensitive corporate and system planning data to their local competitors, whereas the interpretation developed by the Bureau appears to be just the opposite effect, *i.e.*, requires one local competitor – the newcomer – to provide sensitive competitive data to its already well-entrenched and dominant competitor.

C. Inability To Gain Access to MDU Inside Wiring

Some 30% of U.S. homes are contained within MDUs according to recent Congressional testimony.^{25/} Because its business plan emphasize urban areas, the percentage of RCN's potential

^{25/} Testimony of John Windhausen of ALTS on May 13, 1999 before the House Subcommittee on Telecommunications, Trade and Consumer Protection, transcript at 27. In its recent *Notice of Proposed Rulemaking and Notice of Inquiry* in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98, FCC 99-141, *rel.* July 7, 1999, the Commission described MDUs' share of the housing unit market as more than 28%. *See id.* at par. 29. *See also Telecommunications: The Changing Status of Competition to Cable*

subscribers in MDUs is substantially higher. Access to these customers is thus crucial for any MVPD competitor. Yet RCN has experienced great difficulties with such access, principally because incumbent MVPD operators appear willing to use almost any opportunity to freeze out MVPD competitors. This is not a new problem; RCN has brought it to the Commission's attention in prior years' comments.^{26/} The passage of time, however, has done nothing to alleviate the situation. At a recent hearing on inside wiring problems held by the House Subcommittee on Telecommunications, Trade, and Consumer Protection, numerous witnesses testified about the urgency and pervasiveness of the problem.^{27/} RCN concurs fully with other industry representatives who have urged the Commission and the Congress to take more forceful action to open the "last 100 feet" to competition as has been done in the case of the "last mile" in the context of Title II of the Act.

In virtually every case in which RCN introduces its cable/telephone/Internet service into an MDU it prefers to install its own wiring because it is so technically superior to the existing coaxial cable and because doing so gives RCN complete control over its costs. Most building owners give RCN permission to do so, but about 1/3 decline such permission because of the disruption, noise, dust, and other adverse aspects of installing new wiring in existing structures. In such cases RCN cannot serve its potential subscribers unless it has access to the existing cable wiring. RCN has experienced incumbent "lock-outs" in numerous MDUs, all based on the

Television, GAO/RCED-99-158.

^{26/} See RCN's Initial Comments filed on July 31, 1998, at 13-16.

^{27/} See n.25, *supra*.